NURUL IZZATI MUSA v. JABATAN PERKHIDMATAN AWAM MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[JUDICIAL REVIEW NO: WA-25-212-06-2021]
4 DECEMBER 2023

Abstract – *A judicial review application can only be allowed if it is made in respect of decisions that are governed by public law, and not private law. Considering that the decisions made by the Disciplinary Board and Accreditation Committee of the National Institute of Public Administration ('INTAN') are governed by, among others, the terms and conditions as set out in the offer letter issued to the participant, and other Rules made by INTAN, which are in the nature of private contract law and not public law, the judicial review application is not suitable to be allowed.*

ADMINISTRATIVE LAW: *Judicial review – Certiorari and mandamus – Application for – Order to revoke decisions of Disciplinary Board and Accreditation Committee of National Institute of Public Administration ('INTAN') to deduct marks from assessment of participant and to not accredit same with Diploma in Public Administration – Order to compel INTAN to carry out reassessment of marks of participant – Whether decisions of INTAN governed by private law or public law – Whether correct parties named in application – Whether decisions unreasonable, irrational and disproportionate – Whether appropriate to grant mandamus*

The applicant was a participant of the Diploma in Public Administration programme ('DPA programme') conducted by the second respondent. The first and second respondents, respectively, were the Public Service Department (JPA) and the National Institute of Public Administration (INTAN). The applicant was initially enrolled into the DPA programme *via* an offer letter ('offer letter'). Pursuant to the offer letter, all the participants of the DPA programme, including the applicant, (i) were required to abide to all the conditions as set out in the offer letter and all the Rules as set out by the second respondent, which included the: (a) Peraturan-peraturan Program Diploma Pascasiswazah Pengurusan Awam (DPA) Institut Tadbiran Awam Negara (INTAN) ('DPA Programme Rules'); and (b) Peraturan Akademik Program Diploma Pascasiswazah Pengurusan Awam (DPA) Institut Tadbiran Awam Negara (INTAN) ('Academic Rules'); (ii) would from time to time be assessed with respect to four components which were: (a) personality; (b) academic; (c) health and physical fitness; and (d) security screening ('assessment'); and (iii) would be terminated or expelled from the DPA programme if found to have failed to adhere to any of the Rules or to achieve the minimum requirement of the

assessment. Nevertheless, following a physical altercation with one 'Nur Nazihah', a fellow participant of the DPA programme, a verbal complaint was lodged against the applicant to the Sub-kluster Pembangunan Modal Insan ('SKPMI'). Subsequently, an internal investigation was conducted upon the applicant by the SKPMI, and the applicant was found guilty of contravening rr. 8(c), 9, 19(e) and (f)(vii) of the DPA Programme Rules by the Disciplinary Board ('DB'). Ten disciplinary marks were then deducted from the applicant's mark for personality (comment and discipline) component of the assessment ('DB's decision'). A warning was also imposed upon the applicant ('punishment'). The DB's decision was arrived at after: (i) the applicant was furnished with a show cause letter; (ii) the applicant had submitted a written reply to the said show cause letter to the SKPMI; and (iii) the applicant had attended a meeting session chaired by the Director of the second respondent to examine the charges against the applicant ('meeting'). Apart from the DB's decision, the second respondent's Accreditation Committee ('AC') had also passed its decision in accordance with r. 23.1(b) of the Academic Rules to not accredit the applicant with the DPA programme ('AC's decision'). The reason for the decision was because the applicant had failed to achieve the minimum requirement of grade B with respect to the personality (comment and discipline) component of the assessment which also resulted in the applicant failing the overall DPA programme. Dissatisfied with the DB's and AC's decisions ('respondents' decisions'), the applicant filed an appeal by way of letter to the Mesyuarat Search Committee Ketua Pengarah Perkhidmatan Awam. However, the appeal was rejected. This prompted the applicant to file other appeals to the Director General of Public Service and the Chief Secretary of the Government of Malaysia, respectively, *vide* letters which were later forwarded to the second respondent. After a meeting, the second respondent informed the applicant that, among others, the respondents' decisions were final and do not require further review. Aggrieved, the applicant filed the present judicial review application for, *inter alia*: (i) an order of *certiorari* to revoke the respondents' decisions; and (ii) an order of *mandamus* for the applicant's scoring and progress in the DPA programme to be reviewed and/or rechecked by the respondents ('application'). Among the issues that arose in the application were: (i) whether the respondents' decisions were governed by the offer letter, *ie*, a private contract law, or by a public law; (ii) whether considering that the respondents' decisions were not made by the first and second respondents, they had been wrongly named as parties in the application; (iii) whether the respondents' decisions were reasonable, rational and proportionate considering that, among others, (a) the DB had not taken into consideration the reasons proffered by the applicant in her written representation; (b) no charge sheet setting out the charges against the applicant had been issued to the same; and (c) the applicant had not been

afforded sufficient right to be heard as she had only been given one minute to prepare her defence during the meeting; and (iv) whether an order of *mandamus* could be granted in the application.

Held (dismissing application):

(1) The power to make the respondents' decisions was derived from the DPA Programme Rules, Academic Rules and the conditions of the offer letter which formed part and parcel of the agreement between the parties. Hence, the respondents' decisions fell within the realm of private contract law and not of public law. The respondents' decisions were therefore not amenable to judicial review and the application ought to be dismissed. (paras 22 & 24)

(2) Having perused the cause papers, namely in the respondents' affidavit in encl. 19, it was clear that it was the DB and AC that had made the respondents' decisions and not the respondents. As such, the application was brought against the wrong parties as the respondents named in this application were not the makers of the respondents' decisions. Since the application was incompetent, based on this ground alone, it ought to be struck out. (paras 30-31 & 38)

(3) The DB had exercised the power conferred on it reasonably with a proper basis and justification after all material facts, pieces of evidence, witnesses and defence had been scrutinised properly before arriving at the DB's decision. The DB was also satisfied by the internal investigation conducted by the SKPMI that the applicant was involved in a physical altercation with Nur Naziha before deciding that there was a violation of rr. 8(c), 9, 19(e) and (f)(vi) of the DPA Programme Rules by the applicant. Further, the applicant herself had admitted that there was a physical altercation between her and Nur Naziha and sought to give explanation for her behaviour during the incident. It was only after these had been considered by the DB that the same imposed the punishment. Thus, the applicant's contention that the DB had not taken into consideration the reasons proffered by her in the written representation was without basis. (paras 40-41 & 42-43)

(4) As a general rule, the court would not interfere in matters pertaining to professional discipline but would leave the matters to the disciplinary body of that profession. Hence, the severity or leniency of the punishment imposed by the DB was not within the purview of this court. Clearly, the applicant's physical altercation with Nur Naziha was a conduct unbecoming of a participant of the DPA programme who was also a potential Administrative and Diplomatic Officer. Therefore, the power conferred on the DB under r. 28 of the DPA Programme Rules had been exercised reasonably with proper basis and justification. (paras 44, 47, 49 & 50)

(5) The AC's decision, which caused the applicant to fail the overall DPA programme, resulted from the DB's decision. Thus, the AC's decision was rational and proportionate as it was in accordance with the Academic Rules. (paras 51-53)

(6) Although there was no charge sheet issued to the applicant as required under r. 26(f) of the DPA Programme Rules, it was found that the applicant already knew about the charges based on the show cause letter. Having perused the show cause letter, it was found that the same had conveyed with sufficient clarity and certainty the contemplated charges against the applicant and invited her to furnish the respondents with a written statement which was produced in great detail. Nonetheless, considering that the respondents had exercised their discretionary power under r. 40 of the DPA Programme Rules to exempt the application of r. 26(d) to (i) of the DPA Programme Rules when conducting the proceedings towards the applicant, the respondents may skip the procedure to give a charge sheet and request the applicant to provide the representation. (paras 57, 58 & 60)

(7) The applicant had been given the opportunity of being heard during the meeting. The meeting did not simply discuss about the applicant's family background but also the representation made by the applicant. Based on a recording made by the applicant, the said meeting lasted for at least 30 minutes where the applicant was given ample opportunity to explain the incident and provide her justification. Therefore, the applicant's contention that she was only given a minute to provide her defence during the said meeting could not be true. In any event, upon perusal of the cause papers, sufficient right to be heard had been afforded to the applicant in two stages before the punishment was meted out. These two stages were when the applicant submitted her written reply to the show cause letter and the other when she attended the meeting. Due to that, the respondents' decisions were not tainted with irrationality as the issue of no right to be heard was a non-starter. (paras 62-65)

(8) To issue an order of *mandamus*, the applicant must not only show that she has a legal right to have the act performed, but that right must be so clear, specific, and well defined as to be free from any reasonable controversy. The order could not be issued when the right was doubtful, or was a qualified one, or where it depended upon an issue of fact to be determined by the respondents. The failure to show the existence of any legal right to compel the performance of a legal duty cast upon the respondents would deny the order of *mandamus*. Therefore, taking this into consideration and that: (i) there was no provision of law which imposed an obligation or duty upon the respondents to review and/or to carry out a reassessment of the applicant's scoring and progress in the

DPA programme and thereafter to accredit the same with the DPA programme; (ii) the grounds of the application were under the purview of private contract law; and (iii) the respondents' decisions were made in accordance with the established procedure without being tainted with any error of law, irrationality, unreasonableness or procedural impropriety which warranted the intervention of this court, the application was dismissed with costs of RM5,000 without allocator fee. (paras 76-80)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Akira Sales & Service (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal [2018] [2018] 2 CLJ 513 FC ***(refd)***

Ambiga Sreenevasan v. Ketua Pengarah Imigresen, Malaysia & Ors [2012] 7 CLJ 170 HC ***(refd)***

Boey Oi Leng v. Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 HC ***(refd)***

Council Of Civil Service Unions & Ors (CCSU) v. Minister For The Civil Service [1985] AC 374 ***(refd)***

Dato' Seri Dr Ahmad Zahid Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v. Soo Lina & Ors [2018] 6 CLJ 285 CA ***(refd)***

Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***

Ganda Oil Industries Sdn Bhd & Ors v. The Kuala Lumpur Commodity Exchange & Anor [1988] 1 CLJ 126; [1988] 1 CLJ (Rep) 56 SC ***(refd)***

Kelana Megah Development Sdn Bhd v. Kerajaan Negeri Johor & Another Appeal [2016] 8 CLJ 804 CA ***(refd)***

Koon Hoi Chow v. Pretam Singh [1972] CLJU 56; [1972] 1 LNS 56 HC ***(refd)***

Majlis Peguam v. Dato' Seri Dr Muhamad Shafee Abdullah [2016] 8 CLJ 749 FC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Minister of Finance, Government Of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Minister Of Labour, Malaysia v. Sanjiv Oberoi & Anor [1990] 1 CLJ 44; [1990] 1 CLJ (Rep) 200 SC ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(refd)***

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Regina v. Panel On Take-Overs And Mergers, Ex parte Datafin Plc & Anor [1987] All ER 564 ***(refd)***

Wang Choon Yin lwn. Dato' Seri Hj Mustafar Hj Ali Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) Jabatan Imigresen Malaysia & Yang Lain [2020] 7 CLJ 621 CA ***(refd)***

YKK (Malaysia) Sdn Bhd v. Pengarah Tanah Dan Galian Johor [2021] 8 CLJ 179 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 53 r. 1(2)
Specific Relief act 1950, s. 44

For the applicant - Hasrina Hakimi, Farah Nazira Fadzil, Ng Kheng Fai & Norhafizah Shafardeen; M/s Hasrina Hakimi
For the respondents - Kogilambigai Muthusamy; FC

Reported by Syamim Ariffin

JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

[1] The applicant filed an application for judicial review (encl. 15) under O. 53 of the Rules of Court 2012 (ROC).

[2] The applicant was granted leave to apply for judicial review against the respondents to seek the following reliefs:

(i) an order of *certiorari* to revoke the decision to remove the applicant from the Diploma in Public Administration program and decision to not award the applicant with Postgraduate Diploma in Public Management No. 1/2020;

(ii) an order of *mandamus* for a review and/or recheck of the applicant's scoring and progress in the Diploma in Public Administration Program and to award the applicant with a Postgraduate Diploma in Public Management;

(iii) general damages;

(iv) all other directions deemed necessary and incidental thereto; and

(v) costs.

[3] In gist, the applicant filed this judicial review to obtain reliefs in relation to the decision of the respondents to expel the applicant from the Postgraduate Diploma in Public Management (DPA) No. 1/2020 Program and not to accredit her with the DPA (the impugned decision).

[4] After the hearing, I dismissed the applicant's judicial review application (encl. 15). This judgment contains the full reasons for my decision.

Background Facts

[5] The background facts gathered from the cause papers, affidavit in support and submissions of the parties are largely undisputed and can be summarised as follows:

(i) the applicant had been offered enrolment into the DPA No. 1/2020 Program as a participant on a full-time basis for 10 months *vide* an offer letter dated 6 December 2019 (See: encl. 6, exh.t NIM, pp. 32 to 50);

(ii) the letter of the offer had stipulated certain conditions which comprise amongst others the following terms:

(a) the DPA participants are not allowed to delay registering for the DPA No. 1/2020 Program and are required to follow all the prescribed modules successfully until the completion of the programme (See: encl. 6, exh. NIM1, p. 36, (7.1));

(b) during the DPA program, participants are required to abide by the conditions set out in the letter of offer and all Rules set by the National Institute of Public Administration (INTAN) (See: encl. 6, exh.t NIM1, p. 36, (7.2));

(c) the participants from time to time will be assessed with respect to four components which are as follows:

(1) Personality (Commitment and Discipline) (sahsiah-komitmen dan disiplin);

(2) Academic;

(3) Health and physical fitness; and

(4) Security Screening (Tapisan Keselamatan).

(d) failure by any participants to comply with any one or more of the rules or failure to achieve the minimum requirement of assessments would result in the termination of the agreement and the participants will be expelled at any time from continuing with the DPA program (See: encl. 6, exh. NIM1, pp. 36 to 37, (7.2));

(e) notwithstanding, the conditions contained in the letter of offer, the participants are also subject to other conditions specified in the letter offering scholarship, agreements, rules of the DPA program and other relevant documents (See: encl. 6, exh. NIM1, p. 37, (7.5));

(f) amongst the established Rules that form part and parcel of the letter of offer are:

(1) Peraturan-Peraturan Program Diploma Pascasiswazah Pengurusan Awam (DPA) Institut Tadbiran Awam Negara (INTAN) (DPA Program Rules); and

(2) Peraturan Akademik Program Diploma Pascasiswazah Pengurusan Awam (DPA) Institut Tedbiran Awam Negara (INTAN) (Academic Rules);

(see: encl. 6, exh. NIM4, pp. 61 to 101);

(iii) the applicant indicated her agreement by signing the acceptance letter on 15 December 2019 (See: encl. 19, exh. "DAS1, p. 15) and thereafter the applicant entered into a scholarship agreement (See: encl. 6, exh. NIM1, pp. 32 to 50);

(iv) the applicant reported for admission to the DPA Program on 19 January 2020 (See: encl. 19, p. 5, (6(i)));

(v) on 29 October 2020, Sub-kluster Pembangunan Modal Ihsan (SKPMI) received a verbal complaint from Nur Nazihah binti Kamarul Zafik, a participant in the DPA Program with respect to a physical altercation with the applicant at Melor Hostel, INTAN (See: encl. 19, p. 5, (6(j)));

(vi) following thereto, an internal investigation was conducted on 3 November 2020 and 4 November 2020 by SKPMI by examining the CCTV recordings and interviewing witnesses which comprised of participants of the DPA Program for the purpose of assisting in the investigation (See: encl. 19, p. 5, (6(k)));

(vii) based on the investigation, SKPMI found that there was strong evidence to support the complaint of a physical altercation between the applicant and Nur Nazihah binti Kamarul Zafik (See: encl. 19, p. 5, (6(l)));

(viii) the second respondent issued a show cause letter dated 4 November 2020 to the applicant and applicant was required to submit a written reply to the SKPMI within one working day or no later than 5 November 2020 (See: encl. 6, exh. NIM5, pp. 104 to 105 & encl. 19, pp. 5 to 6, (6(m)));

(ix) the applicant submitted a written reply dated 5 November 2020 to SKPMI and confirmed that there was a physical altercation between the applicant and Nur Nazihah binti Kamarul Zafik (See: encl. 6, exh. NIM6, pp. 108 to 109 & encl. 19, p. 6, (6(n)));

(x) apart from the written reply, the applicant was also requested to attend a meeting session chaired by the Director of INTAN on 9 November 2020 to examine the charge against the applicant (See: encl. 19, p. 6, (6(o)));

(xi) after hearing the applicant in her defence and examining the statement of the witnesses in the investigation report dated 5 November 2020, the Disciplinary Board sitting on 19 November 2020 found that the applicant is guilty of violating rr. 8(c), 9, 19(e) and 19(f)(vii) of the DPA Program Rules resulting in 10 disciplinary marks being deducted from the applicant's mark for Personality (Commitment and Discipline) Component and was given a warning (See: encl. 19, p. 6, (6(p)));

(xii) thereafter, INTAN's Accreditation Committee in a meeting held on 10 November 2020 decided in accordance with r. 23.1(b) of the Academic Rules not to accredit the applicant for a DPA. The decision was made as she had failed to achieve the minimum required of Grade B with respect to Personality Development Component resulting in the applicant failing the overall DPA Program. (See: encl. 19, p. 6, (6(q)));

(xiii) the decision of the Disciplinary Board was communicated by way of a letter dated 13 November 2020 (See: encl. 6, exh. NIM7, pp. 112 to 113);

(xiv) meanwhile, the INTAN's Accreditation Committee decision not to accredit the applicant was communicated by way of a letter dated 17 November 2020 (See: encl. 6, exh. NIM8, pp. 116 to 117);

(xv) the applicant submitted an appeal by way of a letter dated 19 November 2020, with respect to the impugned decisions (See: encl. 6, exh. NIM10, pp. 123 to 124);

(xvi) by way of a letter dated 7 December 2020, the applicant was informed that the Mesyuarat Search Committee Ketua Pengarah Perkhidmatan Awam (MSCKPPA) No. 1/2020 had on 4 December 2020 rejected her appeal and upheld the decision of the INTAN's Accreditation Committee which was communicated by way of a letter dated 17 November 2020 (See: encl. 6, exh. NIM12, p. 130);

(xvii) dissatisfied with the decision, the applicant proceeded to appeal to the Director General of Public Service by way of a letter dated 3 December 2020 (See: encl. 6, exh. NIM13, pp. 133 to 136), to the Chief Secretary to the Government of Malaysia by way of a letter dated 2 February 2021 (See: encl. 6, exh. NIM14, pp. 139 to 159) and the Prime Minister of Malaysia by way of a letter dated 2 February 2021 (See: encl. 6, exh. NIM15, pp. 162 to 182);

(xviii) the applicant's appeal letter dated 2 February 2021 to the Chief Secretary to the Government of Malaysia was forwarded to second respondent's office;

(xix) following a meeting by the Top Management of the INTAN on 10 March 2021, the applicant was informed by way of a letter dated 11 March 2021 that:

(a) the Disciplinary Board's decision on 9 November 2020 and the INTAN's Accreditation Committee decision on 10 November 2020 not to accredit the applicant is final and does not require further review; and

(b) the decision is in line with the decision by the Public Service Department communicated by way of a letter dated 7 December 2020 informing the applicant that her appeal had been rejected (See: encl. 6, exh. NIM16, pp. 185 to 186)

[6] Hence, the present judicial review application by the applicant.

The Applicant's Ground For The Judicial Review

[7] In gist, the applicant's application herein is based on the following grounds:

(i) the respondents had committed an error of law in making the decisions in:

(a) concluding that the applicant had breached INTAN DPA Program Rules and INTAN Academic DPA Program Rules;

(b) the applicant was subject to an unfair procedure;

(c) that the applicant's oral and written representations in defending herself were not taken into account;

(d) that the applicant ought to be informed of the reasons for the decisions which included the score/marks of the components in the DPA Program to conclude that she had failed the entire DPA Program; and

(e) that the applicant ought to know the reasons for the decisions and be allowed to make written representations only thereafter.

(ii) the respondents had failed to take into account the following:

(a) the oral and documentary evidence/representation by the applicant to the allegations made against her in the reply letter and during the disciplinary proceeding;

(b) that the applicant was mistreated by Cadet Nur Nazihah;

(c) that the DPA Program was the only way for the applicant to become a PTD Officer;

(d) the relevance and impact of the decisions on the applicants' good name, credibility, career development and prospect/ambition to becoming a civil servant and/or a PTD Officer; and

(e) to account for the decisions which affect the civil service generally.

(iii) the decisions were irrational and unreasonable as the respondents:

(a) failed to appreciate that the respondents contributed to the ambiguous situation where the confidence and integrity of the respondents are being questioned by the decisions;

(b) failed to appreciate the reasons given by the applicant to defend herself before the disciplinary proceeding and that the allegations were generally minor, petty and rectifiable and in some cases incorrect and uninformed;

(c) failed to make a correct decision when it had decided that there were breaches of the INTAN DPA Program Rules and the INTAN Academic DPA Program Rules by the applicant which were serious and justified the respondents' decisions;

(d) failed to appreciate that the respondents had been given the opportunity to evaluate and analyse the evidential proof when the applicant responded with further supporting documents and represented through the oral representations and appeal letters; and

(e) the decisions are imbalanced and disproportionate to the applicant's conduct in view of all the circumstances that are within the respondents' knowledge.

(iv) the respondents had subjected the applicant to an unfair procedure by the following:

(a) failed to retrieve a recorded statement from the applicant during the investigation before coming to the decision to issue the show cause letter and thereafter to hold a disciplinary proceeding against the applicant;

(b) failed to give prior notice to the applicant to attend the disciplinary proceeding;

(c) failed to give prior notice to the applicant to call her witnesses to attend the disciplinary proceeding;

(d) failed to inform the applicant that she would be afforded sufficient time to defend herself but instead informed her that she was given one minute at the start of the disciplinary proceeding to do so and which action is unreasonable and biased; and

(e) failed to give sufficient notice of the decisions before the graduation ceremony instead of three days prior.

The Law

[8] Judicial review is generally concerned with the decision-making process where the impugned decision is flawed on the ground of procedural impropriety.

[9] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process, but also for substance.

[10] It is settled law that the High Court will not interfere with a decision of the respondents unless it can be established that the decision is infected with errors of law.

[11] In the Federal Court case of *Akira Sales & Service (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal* [2018] 2 CLJ 513; [2018] 3 MLRA 589; [2018] 2 MELR 337; [2018] 2 MLJ 537, the liberal approach on judicial review in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 has been re-emphasised as follows:

> [45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:
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> > It is often said that judicial review is concerned not with the decision but the decision-making process. (See *eg*, *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
> >
> > But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that *such a decision is also open a challenge on grounds of 'illegality' and 'irrationality' and in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.*
> >
> > In this context, it is useful to note how Lord Diplock (at pp 410-411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality and (iii) procedural impropriety. This is how he put it:
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> > > *By 'illegality'* as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> > >
> > > *By 'irrationality'*, I mean what can by now be succinctly referred to as 'Wednesday unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount

> Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
>
> I have described the third head as *'procedural impropriety'* rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.
>
> Lord Diplock also mentioned *'proportionality'* as a possible fourth ground of review which called for development. (emphasis added)

[12] Further, the Court of Appeal in *Dato' Seri Dr Ahmad Zahid Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v. Soo Lina & Ors* [2018] 6 CLJ 285; [2018] 1 MLRA 683; [2018] 1 AMR 436; [2018] 2 MLJ 738 explained the test of reasonableness in a judicial review as follows:

> [39] The test of reasonableness has been the subject of many cases over the decades in other Commonwealth jurisdictions. For example, in dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on ground of unreasonableness or irrationality, Henchy J of the Irish Court in *The State (at the Prosecution of John Keegan and Eoin J Lysaght) v. The Stardust Victims' Compensation Tribunal* [1986] IR 642 seta number of such circumstances in different terms. They are:
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> 1. It is fundamentally at variance with reason and common sense;
> 2. It is indefensible for hearing in the teeth of plain reason and common sense; and
> 3. Because the court is satisfied that the decision-maker has breached his obligation whereby the 'must not flagrantly reject or disregard fundamental reason common sense in reaching his decision.
>
> [41] In *Meadows v. Minister for Justice Equlity and Law Reform and others* [2010] IESC 3 Denham J in her *dicta* (*ratio*) set out the following test:
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> This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. *Inter alia*, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises *inter alia* from the duty of the courts to protect constitutional rights.

> When a decision-maker makes a decision which affects rights then, or reviewing the reasonableness of the decision; (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on or rational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective'.

[13] In addition, a decision that involves an error of law is subject to judicial review as explained by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 1 MLRA 336; [1999] 3 AMR 3529; [1999] 3 MLJ 1, where it states:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc' kind, *judicial review will lie to impeach all errors of law made by an administrative body or tribunal and,* we would add, inferior courts. In the words of Lord Denning in *Pearlman v. Harrow School* (*ibid*) at p 70, '... *no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.* (emphasis added)

[14] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the respondents had, among others:

(i) asked itself the wrong questions;

(ii) considered irrelevant matters;

(iii) failed to take relevant matters into consideration;

(iv) failed to apply the proper principle(s) of law; and/or

(v) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

The Decision Of The Court

Contractual Relationship

[15] Having perused the cause papers, I am of the view that the decision of the respondents is governed by an agreement between the applicant and the respondents by an offer letter dated 6 December 2019.

[16] The applicant had agreed and signed the acceptance letter dated 15 December 2019.

[17] The principle that the contract of the Government falls under private contract law can be derived from the Court of Appeal case of *Kelana Megah Development Sdn Bhd v. Kerajaan Negeri Johor & Another Appeal* [2016] 8 CLJ 804; [2017] 2 MLRA 452 as follows:

A [30] Before proceeding further, we wish to deal briefly with the difference between public law and private law rights. Public law, we apprehend, governs relationships between Governments or public authorities and subjects, where the authority concerned has power in matters that affect the rights of subjects such as the matter before us that is land acquisition. Additionally, public law also governs
B relationships that are of direct concern to society such as criminal law. In short, public law powers cannot be exercised by any private individual or entity. Private law on the other hand, deals with the relationships between private individuals or entities with which the State is not directly concerned, as in the relations between husband
C and wife, the law of contract and law of torts. *Governments and public authorities too can be subjected to private law as in cases where the government contracts with a private individual* or a corporation to enter into a transaction. Private law is the counterpart to public law.

(emphasis added)

D **[18]** Applying the principles of law and case law above to the facts in the present case, it is my view that this case falls within the contractual nature which is governed by private contract law and not governed by public law.

[19] Further, the test on whether an act, omission, conduct or decision ought to be the subject matter of private law as opposed to judicial review
E proceedings is based primarily on the source from which the act, omission, conduct or decision emanates.

[20] I find support for my view by referring to the then Supreme Court case of *Ganda Oil Industries Sdn Bhd & Ors v. The Kuala Lumpur Commodity Exchange & Anor* [1988] 1 CLJ 126; [1988] 1 CLJ (Rep) 56; [1987] 1 MLRA
F 367; [1988] 1 MLJ 174 where it referred to the decision of *Regina v. Panel on Take-overs and Mergers, ex parte Datafin plc & Anor* [1987] All ER 564 wherein Lloyd LJ said:

> Of course, the source of the power will often, perhaps usually, be decisive. *If the source of power is a statute, or subordinate legislation under a statute, then*
G *clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review:* see *R v. Disputes Committee of the National Joint Council for the Craft of Dental Technicians, ex p Neate* [1953] 1 ALL ER 327; [1953] 1 QB 704. (emphasis added)

H **[21]** In the instant case, the decisions made by the respondents are as follows:

(i) the Disciplinary Board's decision on 19 November 2020 which found the applicant guilty of violating rr. 8(c), 9, 19(e) and 19(f)(vii) of the DPA Program Rules and as punishment imposed a deduction of 10
I disciplinary marks under the Personality (Commitment and Discipline) Component and a warning to the applicant as stated in the letter dated 13 November 2020 (See: encl. 6, exh. "NIM7, pp. 112 to 113);

(ii) the decision of the INTAN's Accreditation Committee on 10 November 2020 not to accredit the applicant's DPA as a result of failing to achieve the minimum Grade B for the Personality Development Component and failing the overall DPA communicated by a letter dated 17 November 2020 (See: encl. 6, exh. "NIM8, pp. 116 to 117);

(iii) the decision during the Mesyuarat Search Committee Ketua Pengarah Perkhidmatan Awam (MSCKPPA) No. 1/2020 on 4 December 2020 which rejected the applicant's appeal and upheld the decision of the INTAN's Accreditation Committee communicated by way of a letter dated 17 November 2020 (See: encl. 6, exh. "NIM12, p. 130); and

(iv) the decision of the top management of the second respondent on 10 March 2021, which informed the applicant by way of a letter dated 11 March 3021 that the Disciplinary Board's decision on 9 November 2020 and the INTAN's Accreditation Committee decision on 10 November 2020 not to accredit the applicant is final and does not require further review (See: encl. 6, exh. "NIM16, pp. 185 to 186);

[22] The power to make all of these decisions mentioned above is derived from the DPA Program Rules, Academic Rules and condition of the offer letter which form part and parcel of the agreement by virtue of para. 7.5 of the offer letter dated 6 December 2019 as follows:

> 7.5 Walau apa pun syarat yang terkandung dalam surat tawaran ini, **tuan/puan adalah tertakluk kepada syarat-syarat lain** yang terkandung dalam surat tawaran biasiswa, dokumen perjanjian, peraturan-peraturan Program DPA INTAN dan dokumen-dokumen lain yang berkaitan. (emphasis added)

[23] I find that:

(i) the Disciplinary Board in arriving at the decision on 9 November 2020, was satisfied that there was a violation of the DPA Program Rules committed by the applicant. The Disciplinary Board exercised its power under r. 28 of the DPA Program Rules, punished by deducting 10 discipline marks under the component of personality assessment and a warning (See: DPA Program Rules In Part A – encl. 6, exh. NIM4, pp. 15-16);

(ii) the decision of the INTAN's Accreditation Committee during the INTAN's Accreditation Committee meeting (Mesyuarat Jawatankuasa Pensijilan INTAN) on 10 November 2020 is pursuant to r. 23.1(b) of the Academic Rules (See: p. 14 of Academic Rules in Part B – encl. 6, exh. NIM4, p. 99 & letter of offer dated 6 December 2019 – encl. 6, exh. NIM1, pp. 32 to 38);

(iii) the decision during the Mesyuarat Search Committee Ketua Pengarah Perkhidmatan Awam (MSCKPPA) No. 1/2020 on 4 December 2020 which rejected the applicant's appeal and upheld the decision of the INTAN's Accreditation Committee communicated by way of a letter dated 17 November 2020 is provided for in r. 36 to 39 of the DPA Program Rules (See: DPA Program Rules in Part A – encl. 6, exh. NIM4, pp. 82 to 83); and

(iv) meanwhile, the decision of the top management of the second respondent on 10 March 2021, which informed the applicant by way of a letter dated 11 March 2021 that the Disciplinary Board's decision on 9 November 2020 and the INTAN's Accreditation Committee decision on 10 November 2020 not to accredit the applicant is final and does not require further review is a reiteration of the earlier impugned decision (as there is no avenue for further appeal provided to the applicant under the DPA Program Rules after the decision is made by MSCKPPA).

[24] It is evident from the above that the respondents' decisions fall within the realm of private contract law and not public law, therefore I am of the view that the respondents' decisions are not amenable to judicial review and hence the applicant's judicial review ought to be dismissed.

[25] In *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145; [2010] 1 MLRA 524, the Federal Court held:

> [21] In view of this, let us begin by first asking ourselves a preliminary question: is the appellant's complaint or grievance amenable for judicial review (before even considering whether the procedure adopted by him is appropriate)? If his complaint is not amenable for judicial review then there is no dispute as to the procedure adopted since he is at liberty to commence his action by way of writ or originating summons. So first we have to determine the parameters of matters which are amenable for judicial review.
>
> [22] It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. *To qualify there must be a sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power* (see para. 61 *Halsbury Laws of England*, 4th edn, 2001 Reissue, vol 1(1)). To illustrate this, we will refer to a number of authorities involving dismissal from service by a public authority ...
>
> [24] So based largely on the fact that the respondent was given the right to enter into a contract of employment with the applicant, which includes the right of dismissal, the Court of Appeal found no public law element in the applicant's complaint to entitle him to the administrative remedies sought in the judicial review.

[34] From the persuasive authorities above, we observed that for the appellant to be amenable for judicial review *there must be the presence of an element of public law* necessary to attract remedies of administrative law.

[61] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, *it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim of infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable*. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambry. Much depends on the facts of the case. *But generally, the court should be circumspect in allowing a matter which should be by way of O. 53 of the RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers, as implied in Kuching Waterfront, would, in our considered opinion, be rendering O. 53 of the RHC redundant.* This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed. (emphasis added)

(See: also *YKK (Malaysia) Sdn Bhd v. Pengarah Tanah dan Galian Johor* [2021] 8 CLJ 179; [2021] 5 MLRA 476; [2021] 6 MLJ 496).

[26] Thus, based on the above, it is my view that the applicant is not entitled to apply for judicial review since the alleged dispute is in the realm of private law involving a contract between the applicant and the respondents. Being a private law matter, judicial review is not appropriate and the proper remedy for the applicant is only damages and not a public law remedy.

The Respondents Should Not Be Named In The Judicial Review Application

[27] It is the submission of the respondents that the impugned decisions were not made by the respondents but by Lembaga Disiplin Program DPA INTAN and Jawatankuasa Persijilan INTAN.

[28] The respondents further submit that Lembaga Disiplin Program DPA INTAN and Jawatankuasa Persijilan INTAN should have been made a party to this application. Therefore, it is submitted that there was a fatal error by not naming the decision maker itself namely Lembaga Disiplin Program DPA INTAN and Jawatankuasa Persijilan INTAN. Accordingly, this application is incompetent and should be struck out.

[29] The identity of the decision maker of the impugned decision has been reflected in the letter informing the impugned decision as follows:

(i) the deduction of 10 discipline marks under the personality assessment component and a warning was imposed by the Disciplinary Board (Lembaga Disiplin Program DPA INTAN) as evidenced from the letter dated 13 November 2020 (See: encl. 6, exh. "NIM7, pp. 112 to 113);

(ii) the decision of the INTAN's Accreditation Committee meeting on 10 November 2020 not to accredit the applicant for DPA as communicated by way of a letter dated 17 November 2020 (See: encl. 6, exh. "NIM8, pp. 116 to 117); and

(iii) the decision during the Mesyuarat Search Committee Ketua Pengarah Perkhidmatan Awam (MSCKPPA) No. 1/2020 on 4 December 2020 which rejected the applicant's appeal and upheld the decision of the INTAN's Accreditation Committee communicated by way of a letter dated 17 November 2020 is provided for in rr. 36 to 39 of the DPA Program Rules (See: encl. 6, exh. "NIM16, pp. 185 to 186).

[30] Having perused the cause papers, namely in the respondents' affidavit in encl. 19, p. 6, para. 6(p), encl. 19, pp. 4 to 5 paras. 6(e) and (f), encl. 19, para. 24(d) pp. 9 to 10, it was clearly stated that it was the Lembaga Disiplin Program DPA INTAN and Jawatankuasa Persijilan INTAN that made the impugned decision and not the first and second respondents.

[31] Based on the above, I am of the opinion that the application was brought against the wrong party as the respondents named in this application was not the decision-maker of the impugned decision.

[32] Furthermore, I am of the view that the applicant must correctly identify the party responsible for the decision in the exercise of the public duty or function which he alleged had adversely affected him.

[33] In the case of *Council of Civil Service Unions & Ors (CCSU) v. Minister for the Civil Service* [1985] AC 374 at 408, Lord Diplock held that:

> The subject matter of every judicial review is a decision made by some person or (body of persons) whom I shall call the decision maker or else a refusal by him to make a decision.

[34] In the case of *Ambiga Sreenevasan v. Ketua Pengarah Imigresen, Malaysia & Ors* [2012] 7 CLJ 170; [2011] 9 MLRH 572; [2012] 1 MLJ 92 at 100, Rohana Yusuf J (as she then was) held as follows:

> [12] Thus, since the first respondent and third respondent are not decision makers of the impugned decision, judicial review cannot lie against them. To put it differently, *there is no decision by the first and second respondent that is before this court to review. On this ground, alone, the application ought to be struck out.* (emphasis added)

[35] Further, the Federal Court in the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 1 MLRA 336; [1999] 3 MLJ 1; [1999] 3 AMR 3529 held that:

> It is right to say, at the risk or being trite, that administrative law is much concerned with the legality of procedures leading up to a decision and, of course, of the decision itself. **It is therefore a matter of the first importance to correctly identify the decision sought to be impugned.** Furthermore, when the date on which a decision is made is important, it may be necessary to know which of a series of acts constituted the effective decision for the purpose of the scheme in question. The same is true where statute allows an appeal to be brought from a decision. **Failure to observe these basic requirements could have fatal consequences as the following authorities will serve to illustrate.** (emphasis added)

[36] Meanwhile, in the case of *Wang Choon Yin lwn. Dato' Seri Hj Mustafar Hj Ali Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Imigresen Malaysia & Yang Lain* [2020] 7 CLJ 621; [2020] 4 MLRA 651, the Court of Appeal stressed that it would render the judicial review application for leave to become incompetent if the judicial review application is taken against an inaccurate decision or against an inaccurate public authority.

[37] In the case of *Boey Oi Leng v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405; [2001] 4 MLRH 274, Low Hop Bing J (as he then was) held as follows:

> *A petition may be described as "frivolous" or "vexatious" where it is obviously unsustainable eg, where the petition is res judicata, or where the wrong party is being sued,* or without merit and unjustified: see *Malaysia High Court Practice, supra*. (emphasis added)

[38] Therefore, based on the above, I am of the view that the applicant's application for judicial review is incompetent and based on this ground alone ought to be struck out.

Whether The Impugned Decision Is Reasonable, Rational And Proportionate

[39] The applicant argued that the respondents' action is unreasonable when it failed to take into consideration amongst others, reasons raised by the applicant in the written representation.

[40] However, I find that the applicant's contention on this issue is without basis. I find that the Disciplinary Board had exercised the power conferred on it reasonably with a proper basis and justification after all material facts, pieces of evidence, witnesses and defence have been scrutinised properly before arriving at the impugned decision.

[41] The Disciplinary Board was satisfied with the finding of the investigation that the applicant was involved in a verbal and physical altercation with Nur Nazihah binti Kamarul Zafik and decided that there was a violation of rr. 8(c), 9, 19(e) and 19 (f) (vii) of the DPA Program Rules which is as follows:

> **Peraturan 8: Tata kelakuan Peserta Program DPA**
>
> Seseorang pelajar Program DPA tidak boleh:
>
> (c) berkelakuan dengan sedemikian cara sehingga memburukkan nama atau mencemarkan imej Program DPA, INTAN dan Perkhidmatan Awam;
>
> **Peraturan 9: Peserta Program DPA hendaklah menjaga tatakelakuan secara lisan/bukan lisan yang boleh mencemarkan imej Program DPA, INTAN atau Perkhidmatan Awam sama ada di dalam atau di luar kampus INTAN sepanjang tempoh program**
>
> **Peraturan 19: Peraturan di Asrama**
>
> Peserta Program DPA dikehendaki mematuhi peraturan di asrama seperti berikut:
>
> (e) **Hendaklah menjaga tata kelakuan** dan tidak mengganggu penghuni-penghuni lain dengan apa cara sekalipun;
>
> (f) **Dilarang melakukan** perkara-perkara yang bertentangan dengan nilai agama, moral dan akhlak seperti berikut:
>
> vii. **bertengkar dan bergaduh** (emphasis added)

[42] More importantly, the applicant had admitted to the physical altercation with Nur Nazihah binti Kamarul Zafik who is a co-participant and sought to give an explanation for her behaviour during the incident.

[43] Following thereto, the Disciplinary Board imposed a punishment of deduction of 10 disciplinary marks under the Personality (Commitment and Discipline) Component and a warning as punishment.

Proportionality

[44] It is a trite law that as a general rule, the court will not interfere in matters pertaining to professional discipline but leave matters to the disciplinary body of that profession.

[45] The Court of Appeal in *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878; [1998] 2 MLRA 208; [1998] 3 MLJ 341; [1998] 4 AMR 3391 held as follows:

It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise, it will be the court, and not the profession that will determine the yardstick of professional behaviour. *A court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of that profession.* (emphasis added)

[46] In *Majlis Peguam v. Dato' Seri Dr Muhamad Shafee Abdullah* [2016] 8 CLJ 749; [2016] 6 MLRA 1; [2016] 5 AMR 705; [2016] 5 MLJ 572 at 587, the Federal Court held:

[29] We were minded of the well settled principle that *as a general rule, the policy is not to interfere in matters of professional discipline, but to leave matters of discipline to the body entrusted by Parliament to regulate and discipline members of the profession. All that is required is that the disciplinary body acts fairly in carrying out its duties, and the hearing conducted thoroughly with due deliberation and understanding given to the facts of the complaint. Unless the disciplinary committee in the exercise of its powers can be shown to have erred in principle, or to have overlooked, misconceived, or disregarded some material matter of fact, or to have failed to act judicially, the court ought not interfere, except in the rarest of cases.* This principle has been applied consistently by our courts (see cases of *Re A solicitor (No. 2)* [1923] 93 LJKB 761; *Re A Solicitor* [1969] 3 All ER 610; *Keith Sellar v. Lee Kwang; Tennakoon v. Lee Kwang* [1980] 2 MLJ 191; [1980] 1 MLRA 461; *Gana Muthusamy v. LM Ong & Co* [1998] 3 MLJ 341; [1998] 2 MLRA 208; *Merchant v. Law Society of Saskatchewan* [2002] 8 WWR 214). However, based on the facts and circumstances surrounding this case we were of the view that the fact that the statements were laudatory in itself did not automatically lead to the conclusion that there had been publicity within the meaning of the 2001 Rules. The statements must be read within the context of the entirety of the articles and surrounding circumstances.

(emphasis added)

[47] Therefore, it is my view that the severity or leniency of the punishment imposed is not within the purview of this court.

[48] The Federal Court in the case of *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405; [1997] 2 MLRA 146; [1998] 1 MLJ 153; [1997] 4 AMR 419 had stated that the test to be adopted is not what the court thinks to be the appropriate penalty, but it is for the disciplinary tribunal to determine the seriousness of the misconduct of its members and to pass the appropriate punishment.

[49] Clearly, the applicant's verbal and physical altercation with Nur Nazihah binti Kamarul Zafik is a conduct unbecoming of a participant of the DPA Program who is a potential Administrative and Diplomatic Officer.

[50] Thus, this court is of the view that the power conferred on the Disciplinary Board under r. 28 of the DPA Program Rules was exercised reasonably with proper basis and justification.

Rational

[51] The Disciplinary Board's decision had resulted in the applicant failing to achieve the minimum requirement of Grade B with respect to the Personality Development Component leading to the applicant failing the overall DPA.

[52] The Disciplinary Board's decision has led to the decision of the INTAN's Accreditation Committee on 10 November 2020 not to accredit the applicant's DPA as a result of failing to achieve the minimum Grade B for the Personality Development Component and failing the overall DPA communicated by a letter dated 17 November 2020 (See: encl. 6, exh. NIM8, pp. 116 to 117).

[53] The decision of the INTAN's Accreditation Committee is rational and proportionate as it is in accordance with the Academic Rules which is exhibited (See: encl. 6, exh. NIM4, pp. 61 to 101 at 95, 99).

> **13. Kedudukan Akademik**
>
> 13.1 *Pelajar perlu mencapai gred minimum B (PNG 3.00) bagi setiap modul yang dijalani.*
>
> 13.2 Pelajar juga perlu mencapai gred minimum lulus yang ditetapkan bagi purata markah untuk setiap Komponen akademik dan Komponen Pembangunan Sahsiah.
>
> 13.3 *Pelajar yang gagal mendapat gred minimum B (PNG 3.00) bagi setiap modul atau bagi purata markah untuk setiap Komponen Akademik dan Komponen Pembangunan Sahsiah dikira sebagai gagal keseluruhan program dan boleh ditamatkan daripada mengikuti program.*
>
> **Faktor-Faktor Penamatan Pelajar**
>
> 22. Pelajar akan ditamatkan daripada mengikuti pengajian sekiranya:
>
> (a) *Gagal mencapai gred minimum B (PNG 3.00) bagi setiap modul atau bagi purata markah untuk setiap Komponen Akademik dan Komponen Pembangunan Sahsiah.* (emphasis added)

Whether The Respondent's Decision Is In Accordance With Established Provisions

[54] Perusing the chronology of facts in relation to the respondent's decision, I find the following event occurred:

29.10.2020	Subkluster Pembangunan Modal Insan (SKPMI) on 29.10.2020 received a verbal complaint from Nur Nazihah Binti Kamarul Zafik with respect to the physical altercation between her and the Applicant at Asrama Melor, INTAN (See: **Enclosure 19, page 5, [6(j)]**)
3.11.2020 to 4.11.2020	SKPMI conducted an internal investigation by examining CCTV recordings and called a few witnesses from amongst the participants of the DPA Program and prepared an investigation report (See: **Enclosure 19, page 5, [6(k) & (l)]) & (Enclosure 19, page 10, [25(a)]**)
4.11.2020	SKPMI has issued a show cause letter dated 4.11.2020 to the Applicant and the Applicant is required to submit a written reply to SKPMI within 1 working day or no later than 5.11.2020 (See: **Enclosure 19, pages 5-6, [6(m)]**) • **Show cause letter dated 4.11.2020 Enclosure 6, Exhibit NIM-5, pages 104-105**)
5.11.2020	The Applicant has submitted a written reply to SKPMI confirming there was a physical altercation and provided her justification for the incident (See: **Enclosure 19, page 6, [6(n)]**) • **Representation letter dated 4.11.2020 – Enclosure 6, Exhibit NIM-5, pages 108-109)**
6.11.2020	SKPMI has prepared a Minute to the Director of INTAN which contains the investigation report of the Applicant's case and several matters were proposed to the Director of INTAN including the instruction to exempt certain regulations under the DPA Program Rules as the DPA Program is nearing its end and. The Director of INTAN agreed (See: **Enclosure 19, page 10, [25(b)]**)
9.11.2020	Apart from the written reply, the Applicant was also called to provide an explanation with respect to the show cause letter (See: **Enclosure 19, page 6, [6(o)]**)
9.11.2020	After the proceedings, the Disciplinary Board decided that the Applicant is guilty of violating Rules 8(c), 9, 19(e) and 19(f)(vii) of the DPA Program Rules and is punishable by deduction of 10 discipline marks under the component of personality assessment and a warning (See: **Enclosure 19, page 6, [6(p)]**)
10.11.2020	INTAN's Accreditation Committee during its meeting decided that pursuant to Rule 22 of Academic Rules the Applicant will not be awarded the DPA for failure to achieve the minimum Grade B for the Personality Development Component (See: **Enclosure 19, page 6, [6(q)]**)

11.11.2020	Search Committee Meeting held by the Director General of Public Service held that the Applicant had failed to meet the conditions of appointment to the PTD Service Scheme. • (See: **Enclosure 6, Exhibit "NIM-8", pages 116-117, [3]**)
13.11.2020	Decision of the Disciplinary Board has been delivered to the Applicant *via* letter dated 13.11.2020. • (See: **Enclosure 6, Exhibit "NIM-7", pages 112-113**)
17.11.2020	Decision of the INTAN's Accreditation Committee not to accredit the Applicant's DPA has been delivered to the Applicant *via* a letter dated 17.11.2020. • (See: Enclosure 6, Exhibit "NIM-8", pages 116-117)

[55] Based on the above chronology, it is my view that the proceedings have been conducted based on r. 26 of the DPA Program Rules. (See: pp. 13 to 14 of DPA Program Rules; encl. 6 exh. NIM4 pp. 61 to 101 @ 78 to 79)

Charge Sheet

[56] The applicant further argued that the decision made by the respondents is unreasonable as there is no charge sheet issued to the applicant as per r. 26 of DPA Program Rules and thus, the applicant has been denied the right to represent herself.

[57] Even though there is no charge sheet issued by the respondents to the applicant as required under r. 26 (f) of DPA Program Rules. I find that the applicant already knew about the charges based on the show cause letter dated 4 November 2020.

[58] Having perused the said show cause letter dated 4 November 2020, I find that the show cause letter conveyed with sufficient clarity and certainty the contemplated charges against the applicant and invited her to furnish the respondents with a written statement which was furnished in great detail.

[59] This can be gleaned from the content of the show cause letter dated 4 November 2020 which states as follows:

> 2. Adalah dimaklumkan bahawa satu laporan telah diterima oleh Sub Kluster Pembangunan Modal Insan, Institut Tadbiran Awam Negara (INTAN) yang menyatakan bahawa puan, *pada 2 Oktober 2020 (Jumaat), sekitar pukul 1.00 hingga 2.00 pagi, puan telah didakwa bertengkar dan memukul peserta bernama Nur Nazihah Binti Kamarul Zafik (Sidang 3) di Kawasan Asrama Melor, INTAN Bukit Kiara.*

3. Berdasarkan siasatan yang dilakukan oleh Sub Kluster Pembangunan Modal Insan (SKPMI), INTAN dan menimbangkan segala maklumat yang diterima, *puan disyaki telah bertengkar dan bergaduh di kawasan premis INTAN dan perbuatan tersebut boleh ditafsirkan melanggar peraturan 8(c), peraturan 9, peraturan 19(c) dan (f)(vii) di bawah Peraturan Program Diploma Pascasiswazah Pengurusan Awam (DPA) INTAN iaitu:* (emphasis added)

[60] Added to that, I find that the respondents had exercised their discretionary power under r. 40 of the DPA Program Rules to exempt the application of r. 26(d) to 26(i) of the DPA Program Rules when conducting the proceedings towards the applicant. Through the exemption, the respondents may skip the procedure to give the charge sheet and request the applicant to provide the representation.

[61] Rule 40 of the DPA Program Rules states that:

40(1) Pengurusan Tertinggi INTAN menpunyai kuasa untuk memberi apa-apa pengecualian yang difikirkan sesuai daripada keperluan-keperluan Peraturan ini.

[62] In the instant case, I find that the applicant was given the opportunity of being heard during the proceedings which were held on 9 November 2020. The proceedings did not simply discuss about the applicant's family background but also the representation made by the applicant. This had been mentioned in para. 27 of the first and second respondent's affidavit in reply affirmed on 13 October 2021 (encl. 35).

[63] Based on encl. 33 which is the applicant's affidavit reply exhibiting a transcript of the Disciplinary Board's proceeding on 9 November 2020 prepared by the applicant based on a recording done by her establishes that the entire meeting lasted at least 30 minutes between (4.45 to 5.15pm) where the applicant was given ample opportunity to explain the incident and provide her justification. (See: encl. 33, exh. NIM20, pp. 12 to 29).

[64] Therefore, the applicant's contention that she was merely given a minute to provide her defence during the meeting on 9 November 2020 cannot be true. (See: encl. 6, p. 12, [22] & pp. 17 to 18, [44]).

[65] In any event, upon perusal of the cause papers, I am of the considered view that sufficient right to be heard had been given to the applicant in two stages before the punishment had been meted out. The applicant was entitled to two chances to defend herself, one in a written reply to the show cause letter dated 4 November 2020 and another one during the proceedings which were held on 9 November 2020. Thus, I view that the decision made by the respondents does not taint with irrationality as the issue of no right to be heard is a non-starter.

[66] Therefore, I view that the disciplinary proceedings conducted by the respondents against the applicant are in accordance with the established procedure laid down in the DPA Program Rule, Academic Rule and within the discretion of the respondents.

Duty To Give A Reason

[67] Another issue raised by the applicant is that there has been a failure by the respondents to give reasons to the applicant in arriving at the impugned decision.

[68] However, I find that there is no express provision in the DPA Program Rules which imposes a duty on the part of the respondents to give a reason for the imposition of such punishment.

[69] I find support for my view by referring to the Federal Court case of *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777; [2004] 1 MLRA 387; [2008] 3 AMR 689 as follows:

> Reading the provisions of the 1970 Regulations in its entirety, *I see no requirement that entitles the respondent to be informed of the possibility of him being dismissed or reduced in rank in the event he is convicted of any of the charges preferred against him in either the show cause letter or prior to the start of the disciplinary enquiry. There is no provision imposing a similar obligation as that prescribed by reg. 28(1) of the 1993 Regulations. Since the 1970 Regulations impose no duty on the 1st Appellant to inform the respondent at the first opportunity of the likelihood of his dismissal or reduction in rank, the 1st appellant cannot be said to have deprived the respondent of any procedural fairness as there cannot be any breach of duty where none exists in law.* (emphasis added)

(See also: *Minister Of Labour, Malaysia v. Sanjiv Oberoi & Anor* [1990] 1 CLJ 44; [1990] 1 CLJ (Rep) 200; [1990] 1 MLJ 112; [1989] 1 MLRA 278; *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105; [2002] 3 MLJ 72; [2002] 1 MLRA 511; [2002] 3 AMR 2817).

Mandamus

[70] One of the reliefs sought by the applicant is a *mandamus* order that a review and/or reassessment of the applicant's scoring and progress in the DPA Program is carried out and to accredit the applicant with the DPA Program. (See: encl. 30, p. 4, [3(b)]).

[71] The Federal Court in *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 641; [2008] 1 MLRA 705, held that an order of *mandamus* can be granted either:

(i) under s. 44 of the Specific Relief Act 1950 (SRA); or

(ii) the additional powers of the High Court provided by para. 1 of the Schedule to the Courts of Judicature Act 1964 (CJA).

[72] It is also to be noted that O. 53 r. 1(2) of the ROC provides that this order (O. 53) is subject to the provisions of Chapter VIII of Part 2 of the SRA.

[73] Therefore, any application for an order of *mandamus* made by way of judicial review proceedings must comply with the requirement of s. 44 of the SRA.

[74] Section 44 of the SRA reads as follows:

> **Enforcement Of Public Duties**
>
> **Power to order public servants and others to do certain specific acts**
>
> 44(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:
>
> Provided that:
>
> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
>
> (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
>
> (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;
>
> (d) the applicant has no other specific and adequate legal remedy; and
>
> (e) the remedy given by the order applied for will be complete.
>
> (2) Nothing in this section shall be deemed to authorize a Judge:
>
> (a) to make any order binding on the Yang di-Pertuan Agong;
>
> (b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or
>
> (c) to make any order which is otherwise expressly excluded by any law for the time being in force.

[75] In *Koon Hoi Chow v. Pretam Singh* [1972] CLJU 56; [1972] 1 LNS 56; [1972] 1 LNS 56; [1972] 1 MLJ 180B; [1972] 1 MLRH 497, Sharma J (as he then was) had outlined four prerequisites essential to the issue of an order under s. 44 of the SRA or a *mandamus*:

(i) whether the applicant has a clear and specific legal right to the relief sought;

(ii) whether there is a duty imposed by law on the respondents;

(iii) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondents; and

(iv) whether the applicant has any remedy, other than by way of *mandamus*, for the enforcement of the right which has been denied to him.

[76] Based on the case, in order to issue the order of *mandamus*, the applicant must show not only that he has a legal right to have the act performed but that the right must be so clear, specific, and well defined as to be free from any reasonable controversy. The order cannot be issued when the right is doubtful or is a qualified one or where it depends upon an issue of fact to be determined by the respondents. The failure to show the existence of any legal right to compel the performance of a legal duty cast upon the respondents will deny the order of *mandamus*.

[77] Another important hurdle that needs to be crossed by the applicant for an order of *mandamus* is to show that there is a duty imposed by law on the respondents. In the absence of such legal duty, the *mandamus* shall not lie against the respondents.

[78] Based on the above, I am of the considered view that there is no provision of law imposing an obligation or duty on the respondents to review and/or carry out a reassessment of the applicant's scoring and progress in the DPA Program and thereafter to accredit the applicant with the DPA Program.

Conclusion

[79] Premised on the aforesaid reasons, I am of the view that the grounds for the application are under the purview of private law and the decisions of the respondents are made in accordance with the established procedure and are not tainted with any error of law, irrationality, unreasonableness or procedural impropriety that warrant the intervention of the court.

[80] As such, the applicant's application for a judicial review (encl. 15) is dismissed with costs of RM5,000 without the allocatur fee.